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Informal Preparatory Meeting of the Ad Hoc Committee for the Negotiation of a Convention against Corruption
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Proposals and contributions received from Governments

Pakistan: proposed amendments to the United Nations Convention against Corruption*

Synopsis

1. Off-shore jurisdiction and "insulation" should end and the Convention must extend to all territories under the control of the States parties.

2. Retention of the proceeds of corruption should be treated as a stand-alone and independent offence.

3. The requirement of definitely proving *mens rea* should be dispensed with while defining corruption, since it is extremely difficult to do so.

4. A central authority should be nominated by each State to entertain and process requests for seizure, confiscation, mutual cooperation and so on.

5. States should be empowered to declare transactions resulting from corruption voidable.

Specific proposals

Article 2: Use of terms

6. The term "public office holder" should also be defined so as to include public office holders within the purview of the Convention.

* The amendments proposed by Pakistan are to the consolidated draft text of the United Nations Convention against Corruption produced by the Informal Preparatory Meeting in Buenos Aires (see A/AC.261/3).

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Article 9: Procurement[1]

Paragraph 1

7. Pakistan proposes the following text:

"Procurements in the public sector shall be made in a transparent, fair, open and standardized manner."

Paragraph 2

8. Pakistan proposes the following text:

"States Parties shall endeavour to adopt the necessary legislative measures to introduce uniform legislation, rules and manuals for all the procurement agencies in their respective jurisdictions and those regulations shall be prepared with due regard to recognized international texts in the area."

Article 11: Accounting

Paragraph 11 (a)

9. Pakistan proposes the following text:

"The application of this article shall be restricted to legal persons, excluding natural persons, unless so specifically legislated by the State Party to this Convention."[2]

Paragraph 11 (b)

10. Pakistan proposes the following text:

"Each State Party shall endeavour to take effective measures to ensure that there is satisfactory monitoring of abnormal banking transactions and, in appropriate cases, the monitoring department may require proof to satisfy itself with regard to the legitimacy of the origin of the money."[3]

Article 13

Paragraph 1

11. Pakistan proposes the following text:

"Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally and such intention may reasonably be deduced from the circumstances:"[4]

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[1] Procurement has not been addressed at all. The proposed language is in line with the spirit of the convention. The existing model law of the United Nations Commission on International Trade Law can be adopted.

[2] An effort has been made to emphasize the significance of corruption in the private-public relationship.

[3] This is a basic obligation.

[4] It is intended that the requirement of *mens rea* be dispensed with by diluting the words "or appears to have been done intentionally". In fact the word "intentionally" should be deleted, since the offence of corruption should be treated as a crime of "strict liability". It should also be

Article 14

Paragraph 1

12. Pakistan proposes the following text:

"Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally in the course of business activity and such intention may reasonably be deduced from the circumstances:"

Proposed new article[5]

13. Pakistan proposes the following text:

"*Criminalization of hiding the proceeds of corruption*

"Each State Party shall adopt such legislative and other measures as may be necessary to establish the following as criminal offences:

"(a) Purchasing immovable property from the proceeds of corruption and continuing[6] to retain it under any name;

"(b) Maintaining bank accounts, investments and any other form of property that attempts to hide the proceeds of corruption and continuing to retain it under any name.

viewed as a crime of special peculiarities in which proving "intent" of corruption is close to impossible. The elements of the crime itself means *mens rea*. For example, if any abnormal payment is received in the account of a public servant from an agent of a company that has been awarded a contract by the said public servant, then should those facts not be enough to establish that corruption has occurred? Why make the effort to look for an elusive and vague concept of "intention" that may be increasingly difficult to establish"?

In Pakistani experience, it is seen that the National Accountability Bureau has complete access to records and documents but still has failed to prove criminal intent or *mens rea*, so how is it possible for the said intent to be ascertained from the record and persons scattered in several States?

That is why the Bureau's Ordinance several offences do not require the proof of criminal intent. Even in international law offences of genocide under the Rome Statute of the International Criminal Court (A/CONF.183/9) do not require proof of *mens rea*. The fact of the commission of the crime and its imputability with the person is sufficient to establish criminal liability.

[5] This is a new provision to be inserted after article 14. Articles 13 and 14 are the soul of the convention since they define or lay down the contours of offence of corruption. The hiding of proceeds of crime is a stand-alone offence. It is most appropriate if it is placed after article 14. The formulation is quiet similar to articles 13 and 14.

[6] Continuation of retention of the proceeds of crime is very necessary and must not be allowed to be deleted. The word "continuing", makes the offence of retention of ill-gotten wealth a continuing offence and is not defeated by the argument of retrospectivity.

Article 15: Criminalization of laundering of proceeds of corrupt practices

Paragraph 1

14. Pakistan proposes the following text:

"Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally and such intention may reasonably be deduced from the circumstances:"[7]

Proposed new article[8]

15. Pakistan proposes the following text:

"*Treatment of the consequences of corruption*

"1. Each State Party, in accordance with its domestic law, may opt to cancel, rescind, recall or set aside any contract, arrangement or benefit awarded or given in direct consequence of an act of corruption.

"2. Nothing in this article shall prevent any private party from pressing claims against natural or legal persons who are found to have committed acts of corruption."

Article 20: Cooperation with and between national authorities

Paragraph 8 (a)

16. Pakistan proposes the following text:

"A central authority be nominated by each State Party to entertain and process requests for seizure, confiscation and so on to promote mutual cooperation."

[7] The concept of intention should ideally be deleted for the reasons given above. However, if it is not removed after negotiation, then the above text is proposed to dilute the effect of requiring *mens rea* to establish the crime of corruption.

[8] This new provision provides for the consequences of corruption and gives the option to the State to declare void any contract that has resulted from corruption. It also protects private parties. It empowers the State to exercise jurisdiction and to cancel the benefit, contract and so on received on account of corruption. Such a clause is absolutely necessary because, on the one hand, the confiscation of proceeds of corruption is ordered in the convention and it will leave a considerable anomaly if the consequences of corruption are allowed to continue. Therefore, it is absolutely necessary that State be empowered under the convention to exercise the option either to allow the contract to continue or to cancel the same. For example, in the case of the independent power producer contracts, even if the offenders are to be punished, what difference would it make to the people if contracts that inflict a terrible burden on them are allowed to continue? Therefore, once it is found that corruption has been committed, the actions resulting from the act of corruption should be, at the option of the host State, struck down.

Article 25

17. The following new paragraph may be added:

> "7. The Convention shall extend to all the territories of the State Party, whether controlled directly or indirectly, and the State Party shall make the necessary legislative changes to ensure that all protection or financial immunity in the nature of off-shore operations and so on are withdrawn for the purposes of this Convention."[9]

[9] This formulation demolishes the defence of off-shore protection and other financial "insulations". In order to make the convention an effective instrument, it is necessary for all off-shore or special banking jurisdictions to be brought within the scope of the convention.